87-1654

Supreme Court, U.S.
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APR 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES T. CARKULIS, PETITIONER

v.

STATE OF MONTANA AND DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, RESPONDENTS

ON APPEAL FROM THE SUPREME COURT OF MONTANA

JURISDICTIONAL STATEMENT

Jeffrey T. Renz
724 Grand Avenue
Billings, MT 59101
(406) 256-6151

Allen Beck
P.O. Box 21253
Billings, MT 59104
(406) 245-6848
COUNSEL FOR PETITIONER

April 1, 1988

29pp

QUESTIONS PRESENTED

I. Where an accused sincerely contends that the prosecution will fail to prove a prima facie case, may a legislature or a state court, applying Mont. Code Ann. § 46-15-323 (1987), order the accused to communicate to the prosecutor the names and addresses of persons who might testify, together with their statements, to communicate a list of papers, documents, photographs, and other tangible objects which may be used at trial, and to authenticate documents and things, which he believes may aid the prosecutor's case-in-chief, without violating the accused's privilege against self-incrimination?

II. Montana Code Annotated §46-15-323(4)(c) (1987), requires an accused to make available to the prosecutor "a list of all papers, documents, photographs, and other tangible

objects that he will use at trial." Section 46-15-323(6) authorizes the district court to order any person to make material available to the prosecutor when he demonstrates substantial need for the material, undue hardship in obtaining it, and no violation of the accused's constitutional rights. May a state court, applying this section, order an accused to make available to the prosecutor "all papers, documents, photographs, and other tangible objects" which may be used at trial, when neither the order nor the application particularly describe the items to be seized?

III. May a state court impose sanctions which preclude an accused from offering any rebuttal evidence, where the accused challenges the constitutionality of state criminal discovery statutes?

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2 Wright & Miller, Federal Practice & Procedure §256 19

JURISDICTIONAL STATEMENT

Appellant James T. Carkulis appeals from the final judgment and order denying rehearing of the Supreme Court of Montana dated November 25, 1987, and January 5, 1988, respectively, holding that Montana's criminal discovery rules, Mont. Code Ann. § 46-15-323 (1987), do not violate his right to be free from unwarranted seizures, his right against self-incrimination, and his right to call witnesses on his own behalf, guaranteed by the fourth, fifth, sixth, and fourteenth amendments of the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of Montana is reported at 746 P.2d 604. The slip opinion is reprinted in the Appendix hereto. The memoranda opinions of the District Court for the Thirteenth Judicial

District of the State of Montana (Baugh, D.J.) are unreported. The district court's order of December 20, 1985, is reprinted in the Appendix, p. 58a, below. The district court's memorandum and order of April 9, 1987, is reprinted in the Appendix, p. 65a, below.

JURISDICTION

Appellant filed a Petition for Writ of Supervisory Control in the Montana Supreme Court on May 4, 1987, challenging the constitutionality of Mont. Code Ann. § 46-15-323 (1987), on its face and as applied. The Montana Supreme Court entered its decision on November 25, 1987, upholding the validity of the statute. Appellant timely moved for rehearing. The motion for rehearing was denied on January 5, 1988. App., p. 78a.

The jurisdiction of this Court to

review the judgment of the Montana Supreme Court is invoked pursuant to 28 U.S.C. § 1257(2).

STATUTES INVOLVED

Amendment IV, United States Constitution (1791)

The right of the people to be secure in their . . . papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . things to be seized.

Amendment V, United States Constitution (1791)

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

Montana Code Annotated §§ 46-15-321 to -329 (1987) App. p. 93a.

STATEMENT OF THE CASE

The Appellant, James T. Carkulis, was charged by information with felony forgery of "lien waivers"[1] on August 7, 1984.

On December 4, 1985, following the enactment of Ch. 202, L. Mont. (1985), Mont. Code Ann. §§46-15-321 to -329 (1987), App., p. 93a, the prosecutor filed a "Motion for Discovery." App., p. 81a. Carkulis objected to the motion on the grounds that the sought-for disclosure would violate his fifth amendment privilege, and violated the protections accorded to him by the fourth amendment. App. p. 84a.

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[1]A lien waiver is a document which purports to limit a supplier's right to file a mechanic's lien against real property. A sample of one alleged waiver is set forth in the Appendix, p. 91a.

On December 20, 1985, the district court granted the prosecutor's motion in part. Carkulis was ordered to give the prosecutor: names and addresses of persons he will call as witnesses; copies of their statements; and all papers, documents, photographs and other tangible objects which Carkulis "will" use as exhibits at trial. App. p. 59a.

On December 11, 1986, the Montana Supreme Court denied Carkulis's petition for relief from the district court's order, finding that the case was not yet ripe for review. App., p. 61a.

Carkulis then moved the district court to reconsider its order. On April 9, 1987, the district court denied that motion and unconditionally ordered Carkulis to produce the materials set out in the December 20, 1985, order "by May 1, 1987, or be precluded from offering the same at trial." App. p. 65a.

On May 4, 1987, Carkulis again petitioned the Montana Supreme Court for a Writ of Supervisory Control.

Carkulis argued that both Mont. Code Ann. § 46-15-323 (1987) and the district court's order violated the fourth amendment, violated his right against self-incrimination, and violated his sixth amendment right to compulsory process. The Montana Supreme Court considered these arguments but upheld the statute:

> In this case, we determine that the reciprocal pretrial discovery statutory provisions in criminal cases, for the purposes of this case, and when applied as herein directed, are amenable to the state and federal constitutions and not barred by the provisions of the state and federal constitutions herein specified.

App. p. 2a.

Throughout these proceedings, Carkulis has asserted in good faith, and today sincerely believes, that the prosecutor will be unable to prove a prima facie case sufficient to survive a motion

to dismiss; Carkulis believes and asserts that information and things within the scope of the statute and the district court's order will aid the prosecutor in resisting that motion and assist the prosecutor in preparing and presenting his case-in-chief.

Carkulis cannot now state in good faith that he will call any witness or use any exhibit. He has asserted that the ordered production exceeds constitutional limitations. Because of thse assertions, Carkulis is now barred from calling witnesses or introducing exhibits in the event that his motion to dismiss is denied. App., p. 65a.

THE QUESTIONS ARE SUBSTANTIAL

The fourth amendment and fifth amendment implications of general discovery rules have never been squarely addressed by this Court. This Court has

decided that pretrial disclosure of alibi witnesses does not violate the right against self-incrimination. Williams v. Florida, 399 U.S. 78 (1970). However, in Williams the accused's alibi witness did not rebut the prosecution's case-in-chief and did not have knowledge about facts of the crime charged.

In Taylor v. Illinois, __ U.S. __, 108 S. Ct. 646 (1988), only the constitutionality of sanctions for flagrant discovery abuses was at issue.

The case at bar directly raises the issues of whether an accused may be compelled to communicate incriminating information to the prosecution as a part of discovery ordered by the legislature and whether the state can avoid the fourth amendment's requirements of an oath and particular description of things to be seized.

The Appellant, James Carkulis, was

charged with forging signatures on lien waivers. Appellant's attorneys have investigated this case. We are convinced that the prosecution will fail to establish a prima facie case and that there is a rebuttal to the State's charges.

But, as was the defendant in Simmons v. United States, 390 U.S. 377 (1968), Carkulis is faced with a dilemma. The rebuttal evidence is, arguably, additional proof of guilt and is likely to lead to additional prosecution evidence. By preparing and communicating lists of witnesses and documents, who know or which contain incriminating evidence, the accused will improve both the prosecutor's case-in-chief and his odds of overcoming a motion to dismiss. As a result of the Court's application of §46-15-323, Carkulis has been compelled to surrender his right to conduct a defense in order to

assert his fifth amendment privilege against self-incrimination and his right to be free from general warrants.

Thus, the first question is squarely presented to this Court: may a state compel an accused to provide the prosecution with information which will aid it in proving its case?

For over three hundred years, an accused has been free from such compulsion. Levy, L., Origins of the Fifth Amendment, 301-09 (2d Ed. 1986). An accused's (and a witness's) right to remain silent, to refuse to identify favorable or unfavorable witnesses or to refuse to identify physical evidence, whether exculpatory or inculpatory, is unquestioned. Maness v. Meyers, 419 U.S. 449, 473 (1975) (White, J. concurring); Malloy v. Hogan, 378 U.S. 1, 12 (1964) (potential witnesses); Rhode Island v. Innis, 446 U.S. 291, 301 n.5 (1980)

(exculpatory information). The privilege requires "the government 'to shoulder the entire load'" of proving guilt. Miranda v. Arizona, 384 U.S. 435, 460 (1966). Montana's discovery rules, under the facts of this case, require each defendant who desires to rebut the state's charges to share that load. Changes in criminal discovery rules have therefore brought us to an historic juncture. Shall the current interest in an efficient trial overrule the privilege against self incrimination? This court should accept jurisdiction to answer this question.

Montana Code Ann. § 46-15-323(6)

(1987)[2] authorizes the district court to order the accused to deliver materials or communicate information to the prosecution. The fourth amendment commands that warrants (or other documents authorizing seizure) may be issued only particularly describing the things to be seized. "[This] statute lacks this particularization." Berger v. New York, 388 U.S. 41, 55 (1967). This statute requires only showings of (1) substantial need; (2) undue hardship; and (3) no violation of the accused's constitutional

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[2] "Upon motion of the prosecutor showing that he has substantial need in the preparation of his case for additional material or information not otherwise provided for, that he is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the accused's constitutional rights, the court in its discretion may order any person to make such material or information available to him. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive." Mont. Code Ann. §46-15-323(6) (1987).

rights. This is the only statutory provision (aside from Montana's search and seizure provisions) which authorizes the prosecutor to obtain material from the accused.

The prosecutor applied for an order directing Carkulis to make available "all papers, documents, photographs and other tangible objects which the defendant will use at trial." App., p. 82a. This is the language of the statute. The district court ordered disclosure in the same language: "all papers, documents, photographs and other tangible objects which the defendant knows in good faith will be used as exhibits at trial." App. p. 59a. While this order was qualified by "good faith" and "subject to constitutional limitations," the district court's Order of April 9, 1987, (which followed Carkulis's assertions of good faith and his privilege against

self-incrimination) was unconditional: "[D]efendant shall disclose the materials set out in the December 20, 1985 order...."

Fourth amendment issues raised by the form of the prosecutor's discovery request and the breadth of the district court's order have been simmering in this Court for years. See, Fisher v. United States, 425 U.S. 391, 401 n.7 (1976) (breadth of subpoena not at issue); United States v. Doe, 465 U.S. 605, 607 n.3 (1984) (breadth of subpoena might violate 4th amendment, but not at issue); cf., Hale v. Henkel, 201 U.S. 43 (1906) (broad subpoena violated fourth amendment).

The district court's order was not issued upon a showing, under oath, of probable cause that items sought by the prosecutor existed. Cf., Carroll v. United States, 267 U.S. 132, 149 (1925). Neither was it issued upon a sworn

application "particularly describing the . . . things to be seized." Amendment IV, United States Const. (1791); Cooley, T., Constitutional Limitations 304 (1868) (Legal Classics Ed. 1987). The Montana Supreme Court circumvented these requirements of particularity by holding that the order was sufficiently limited by the description that only items which will be used at trial would be seized.

Because of the uncertainties of trial, we do not know whether, at the close of the State's case, we will use any exhibit. Cf., Brooks v. Tennessee, 406 U.S. 605, 619 (1972); Miranda v. Arizona, 384 U.S. 435, 541-42 (1966) (White, J., dissenting) (criminal trials are not sure bets). Therefore, the descriptions contained in the court's orders is not "sufficient to enable [Carkulis] to know what particular documents were required and to select them accordingly." McPhaul

v. United States, 364 U.S. 376, 382 (1960). Any document which we fail to produce, we are "precluded from offering at trial."[3]

Thus, this case presents squarely the proper form of a discovery order.

Twenty-three states have criminal discovery rules modeled after Rule 16, Fed. R. Crim. Proc. Under Rule 16 and its state counterparts, discovery of the accused's rebuttal case is conditioned upon the accused's prior waiver of his fourth and fifth amendment rights. If the accused makes a discovery request of the

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[3]As a "protection" against risk or harm, Montana's scheme directs the trial judge--who will rule on Carkulis's motion to dismiss--to review incriminating information in Carkulis's possession before disclosure is made. Mont. Code Ann. § 46-15-328 (1987). Such a review compels the accused to surrender the very protection which the privilege guarantees. See, United States v. Burr, 25 F. Cas. 38 (C.C. Va. 1807) (Marshall, C.J.); Hoffman v. United States, 341 U.S. 479, 486-87 (1951).

prosecution, she is deemed to have waived her rights as to the scope of that request.

Recently, states have adopted rules which authorize the prosecutor to conduct unconditional, widespread discovery into an accused's rebuttal case. Twelve states have adopted schemes similar or identical to Montana's. It appears that this trend will continue.[4]

The supreme and appellate courts of numerous states have considered the constitutionality of their discovery rules. These holdings are in conflict. Compare, State v. Fendler, 127 Ariz. 464,

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[4]Traynor, R., Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L. Rev. 228 (1964); II American Bar Association, Standards for Criminal Justice Discovery and Procedure Before Trial (2d Ed. 1980); National Judicial Conference on Standards for the Administration of Criminal Justice, Standards Relating to Discovery and Procedures Before Trial, § 3.3 (1972).

622 P.2d 23 (Ct. App. 1980), cert. denied, 452 U.S. 961 (1981) (rule requiring disclosure of defense witnesses did not violate privilege); and State ex rel Carkulis v. District Court, ___ Mont. ___, 746 P.2d 604 (1987), with, Prudhomme v. Superior Court of Los Angeles County, 2 Cal. 3d 320, 466 P.2d 673 (1970) (rule requiring disclosure of defense witnesses violated privilege); Scott v. State, 519 P.2d 774 (Alaska 1974) (same).[5] Compare, Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974) (disclosure of materials does not violate constitution), with, In Re Vanderbilt, 439 N.E. 2d 378, 453 N.Y.S. 662 (N.Y. 1982) (compelled production of materials violated privilege). But,

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[5]Both Prudhomme and Scott were decided on independent state grounds.

> "[a]s the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation...."

Counselman v. Hitchcock, 142 U.S. 547, 584-85 (1892).

This Court's broad dictum in Williams v. Florida, 399 U.S. 78, 83-84 (1970), and its reasoning have been widely criticized.[6] It has been the precedent

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[6] See, Berger, M., Taking the Fifth, 96-97 (1980); Blumenson, Constitutional Limitations on Prosecutorial Discovery, 18 Harv. C.R.-C.L.L. Rev. 122 (1983); 2 Wright & Miller, Federal Practice & Procedure, 105-06; In Re Misener, 38 Cal. 3d 543, 698 P.2d 637, 642-48 (1985); Scott, supra, at 783-85.

sustaining the validity of general discovery rules,[7] even though general discovery was not at issue in Williams.

The time is right to reexamine the dictum of Williams. Does Williams mean that an accused may be required to identify a witness who will aid the prosecution in proving its case, when the accused will not decide to call the witness until after the state rests its case-in-chief? Must Carkulis produce rebuttal evidence which will aid the prosecutor in surviving a motion to dismiss?

These questions need to be squarely addressed free of the assumption that the accused "will" offer that evidence. If the case is dismissed after the state rests, that evidence will never be used.

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[7] See, State v. Fendler, 622 P.2d 23 (Ariz. 1980) cert. denied 452 U.S. 961 (1981); State v. Nelson, 545 P.2d 36 (Wash. App. 1975).

Montana has imposed its discovery requirements in such a way as to require Appellant to participate in his own prosecution. Now, since Appellant has objected to such a procedure, he has been barred from offering any evidence at all.

CONCLUSION

For these reasons this Court should note probable jurisdiction.

Respectfully submitted,

JEFFREY T. RENZ
724 Grand Avenue
Billings, MT 59101
(406) 256-6151

ALLEN BECK
P.O. Box 21253
Billings, MT 59104
(406) 245-6848
COUNSEL FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES T. CARKULIS, PETITIONER

v.

STATE OF MONTANA AND DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, RESPONDENTS

ON APPEAL FROM THE SUPREME COURT OF MONTANA

APPENDIX

Jeffrey T. Renz
724 Grand Avenue
Billings, MT 59101
(406) 256-6151

Allen Beck
P.O. Box 21253
Billings, MT 59104
(406) 245-6848
COUNSEL FOR PETITIONER

April 1, 1988

APPENDIX

Opinion of the Montana Supreme Court, State ex rel. Carkulis v. District Court, No. 87-164 November 25, 1987)..... 1a

Order of the District Court, State v. Carkulis, No. DC-84-204 (December 20, 1984)... 58a

Order Denying Supervisory Control, Montana Supreme Court, State ex rel. Carkulis v. District Court, No. 86-026 (December 11, 1986)..... 61a

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Chapter 202, Laws of Montana (1985), Montana Code Annotated §§ 46-15-321 to -329 (1987)..... 93a

No. 87-164
IN THE SUPREME COURT
OF THE STATE OF MONTANA
1987

STATE OF MONTANA ex
rel. JAMES CARKULIS,

Relator,

-vs-

DISTRICT COURT OF THE THIRTEENTH
JUDICIAL DISTRICT OF THE STATE OF
MONTANA, IN AND FOR THE COUNTY OF
YELLOWSTONE, HONORABLE G. TODD
BAUGH, Presiding,

Respondent.

ORIGINAL PROCEEDING:

COUNSEL OF RECORD:

For Relator:

Allen Beck argued, Billings, Montana
Jeffrey T. Renz argued, Billings, Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana; Judy Browning argued, Asst. Atty General, Helena; Harold Hanser, County Attorney, Billings, Montana; Terry Swift, Deputy County Atty., Billings; Mike McGrath argued, County Attorney, Helena, Montana

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Submitted: September 2, 1987
Decided: November 25, 1987

Filed: November 25, 1987

/s/ ETHEL M. HARRISON
Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

In this case, we determine that the reciprocal pretrial discovery statutory provisions in criminal cases, for the purposes of this case and when applied as herein directed, are amenable to the state and federal constitutions and not barred by the provisions of the state and federal constitutions herein specified.

This is an original proceeding in this Court. Relator James Carkulis stands charged with the commission of a crime in the District Court, Thirteenth Judicial District, County of Yellowstone. The State had moved the District Court for an order requiring reciprocal discovery by the defendant under §46-15-323(4), MCA (1985). In an order dated December 20,

1985, the District Court granted the State's motion for pretrial discovery but made no provision in the order for sanctions in the case of noncompliance.

On January 15, 1986, Carkulis filed in this Court a petition for writ of supervisory control or writ of certiorari (Cause no. 86-026 in this Court) relating to the December 20, 1985 District Court order. We ordered a response, and received an answer and briefs from the Attorney General of the State of Montana; the County Attorney of Yellowstone County; and amici curiae from the Moses Law Firm of Billings, Montana; Ungar Law Firm of Bozeman, Montana; and the Montana County Attorneys Association, through its president Mike McGrath of Helena, Montana. However, on December 11, 1986, after oral argument, we denied the petition for writ of supervisory control without prejudice upon the grounds that the District Court

had imposed no sanctions, and might never impose sanctions, and that there was an adequate remedy by appeal.

Thus, the matter returned to the District Court. There, on March 9, 1987, Carkulis moved the District Court to reconsider its order of December 20, 1985. On April 9, 1987, the District Court issued its order denying Carkulis' motion to reconsider and further ordering that unless the defendant disclosed the materials set out in the December 20, 1985 order by May 1, 1987, he would "be precluded from offering the same at trial." The time for compliance by the defendant has passed and neither he, his counsel nor agents, have complied with the pretrial discovery order of the District Court. On May 4, 1987, Carkulis, as relator, filed his second petition for writ of supervisory control or writ of certiorari in this Court and thus the

issue is before us again.

This time, a sanction has been imposed against the defendant, the most drastic available to the District Court under §46-15-329, MCA, that of barring him from offering evidence not disclosed before May 1, 1987.

The first problem is whether this Court should consider the issuance of a writ, either of supervisory control, or of certiorari. Under §27-25-102(2), MCA, if a district court, exercising judicial functions, has exceeded its jurisdiction, and if in the judgment of this Court there is no plain, speedy or adequate remedy, certiorari will lie. Section 27-25-201(2), MCA. In like manner, when a cause of action or a right has arisen under conditions making due consideration in the trial court and due appeal to this Court an inadequate remedy, or when supervision of a trial court other than by

appeal is deemed necessary and proper, a writ of supervisory control may issue. Rule 17(a), M.R.App.P. A petition seeking original jurisdiction in this Court must make a showing of the inadequacy or unavailability of any other remedy, either in the District Court or by appeal to this Court. Crist v. Boyd, District Court (1976), 172 Mont. 38, 560 P.2d 531; Petition of Waite (1964), 143 Mont. 321, 322, 389 P.2d 407, 408.

In the first proceedings brought by Carkulis in this Court, the Attorney General, in his memorandum in support of his response, agreed we should take jurisdiction of the proceedings, and pointed out a proper reason:

> For example, if the court were to decline to take jurisdiction of this application, relator would presumably comply with the District Court's disclosure order. Should relator then be convicted and successfully appeal his case, it might prove unfair to him should a new trial be ordered, since the State would have the benefit of the

> very information which relator believes he should not be required to disclose. Once disclosures are made, they cannot be retracted. See Wardius v. Oregon, 412 U.S. 470, 478 (1973).

Under the record as it is now presented to us in this second application by Carkulis, since he is barred from offering evidence pertaining to the materials sought in pretrial discovery, he may be entirely precluded from offering a defense. He must risk conviction in order to effect an appeal, and then risk the uncertainty of our decision on appeal. Without our intervention now, defendant has a Hobson's choice: Go back to the District Court, comply with the pretrial discovery, hope that the District Court will rescind its order barring the evidence and rely on a successful appeal; or, alternatively, stand pat, risk conviction, and the uncertainty of success on appeal. Moreover, the District Court

order is binding not only on the defendant, but upon his counsel and their agents. They are also at risk for noncompliance through contempt proceedings against them.

Counsel for the State in prosecuting defendant is likely to have a dilemma here with respect to the law: There is a split of authority among neighboring states as to the legality of such pretrial discovery provisions. Unless we set the course in this case of first impression, there are no Montana guideposts for counsel advising their clients with respect to pretrial discovery in criminal cases.

Accordingly, we accept jurisdiction to determine if supervisory control is proper in this matter.

The District Court's Order

On December 20, 1985, the District Court entered its order for pretrial discovery which included the following

provisions:

IT IS HEREBY ORDERED that the defendant, James Carkulis and his counsel or agents, make the following materials and information available to the State without delay for examination and reproduction, subject to constitutional or statutory limitations:

(1) the names and addresses of all persons, other than the defendant, whom he in good faith knows he will call as witnesses at trial, and copies of all statements made by them related to this case;

(2) the names and addresses of any expert witnesses whom he in good faith knows he will call at trial, and summaries of the testimony he expects the witnesses to give at trial;

(3) all papers, documents, photographs and other tangible objects which the defendant in good faith knows will be used as exhibits at trial; and

IT IS FURTHER ORDERED that the defendant shall promptly notify the State of the existence of any additional information or material referred to in the foregoing that is discovered by the defendant after this Order and make such information or material available for examination and reproduction without delay.

On April 9, 1987, the District Court, by a further order, supplemented the foregoing provisions by providing that if the defendant Carkulis did not disclose the materials set out above by May 1, 1987, he would "be precluded from offering same at trial."

Issues Raised by Defendant

The defendant maintains that the District Court's orders violate his rights secured by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Art. II, §§11, 17, 24 and 25 of the 1972 Montana Constitution.

The Applicable Statutes

The legislature adopted in 1985 several provisions relating to reciprocal pretrial discovery in criminal cases. Ch. 202, Laws of Montana (1985). The provisions relating to pretrial reciprocal discovery are now embodied in §§46-15-321 through 46-15-329, MCA. In general, these statutes contain applicable definitions

(§46-15-321); requirements for disclosure by the prosecution (§46-15-322); requirements for disclosure by the accused (§46-15-323); materials not subject to disclosure (§46-15-324); a continuing duty to disclose (§46-15-327); a provision for excision or protective orders (§46-15-328); and provisions for sanctions in the case of noncompliance (§46-15-329).

The orders of the District Court in this case are based on provisions contained in §46-15-323, MCA. The important subsections are:

> (4) Simultaneously with the notice of defenses submitted under subsection (3), the defendant shall make available to the prosecutor for testing, examination, and reproduction:
>
> (a) the names and addresses of all persons, other than the accused, whom he will call as witnesses at trial, together with all statements made by them in connection with a particular case; and
>
> (b) the names and addresses of experts whom he will call at trial, together with the results of the physical examinations,

scientific tests, experiments, or comparisons, including all written reports and statements made by them in connection to the particular case; and,

(c) a list of all papers, documents, photographs, and other tangible objects that he will use at trial.

(5) The defendants obligation under this section extends to material and information within the possession or control of the defendant or his attorneys or agents.

Disclosure of Witnesses and Statements

Carkulis attacks the provisions of §45-15-323(4)(a), MCA, which requires the disclosure of witnesses the defendant will call at trial, together with all statements made by them in connection with this particular case.

The word "statements" found in the statute may in itself be overbroad. We construe the word statements to include tapings, transcriptions, writings or other means used to memorialize the witness as to his observation or impression of a

situation or event, and which may be used either to refresh the recollection of the witness or to impeach him at trial.

Carkulis attacks this statute on the grounds that it violates the state[1] and federal[2] rights against self-incrimination and deprives him of due process.[3]

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1 "No person shall be compelled to testify against himself in a criminal proceeding. . . ." Art. II, §25, 1972 Montana Constitution.

2 "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." Fifth Amendment to the United States Constitution.

3 "No person shall be deprived of life, liberty or property without due process of law." Art. II, §17, 1972 Montana Constitution.

"No person . . . shall . . . be deprived of life, liberty or property, without due process of law;. . ." Fifth Amendment to United States Constitution.

". . . nor shall any State deprive any person of life, liberty or property, without due process of law;. . ." Fourteenth Amendment to United States Constitution.

With respect to the defenses of alibi and self-defense and the former defense of insanity, this Court has already spoken and approved the requirement for a production of a list of witnesses to be used at trial. State ex rel. Sikora v. District Court (1969), 154 Mont. 241, 462 P.2d 897. Sikora arose under former statute §46-15-301, now repealed, (Ch. 202, Laws of Montana (1985)), but the provisions of which have been subsumed in Part 3, Title 46, Criminal Procedure. In Sikora, this Court declared that not all evidence obtained from a defendant is privileged under the Fifth Amendment of the United States Constitution. The production by the defendant of a list of his witnesses relating to those defenses was approved on the grounds that such production merely enabled the prosecution to perform its function at trial more effectively, that the right to remain

silent was not violated because production was not required if the witnesses would not testify, and that the defendant was not required to reveal anything more than he would voluntarily and without compulsion give at trial. This Court also found protection for the defendant in Sikora in that the statute was directed to the purpose of giving notice to the state and that "the defendant who chooses to remain silent until later than the statute indicates may do so and for good cause may still interpose his defenses." 154 Mont. at 251, 462 P.2d at 902. The logic of Sikora now controls the additional defenses now listed in §46-15-323(3) for which the defendant must provide written notice and a list of the witnesses pertaining thereto that he will call at trial.

The United States Supreme Court in Williams v. Florida (1970), 399 U.S. 78,

90 S.Ct. 1893, 26 L.Ed.2d 446, upheld a state statute requiring the disclosure of an alibi defense and alibi witnesses to the state prior to trial as not violating the federal right against self-incrimination. Williams is essentially grounded on the "accelerated disclosure" theory, that is, that at trial, the defendant would have to reveal his alibi and his witnesses relating thereto, and that accelerating the disclosure does not affect his constitutional rights against self-incrimination. Nonetheless, in Williams, Justice Black took an opposite tack:

> [Federal constitutional rights] are designed to shield the defendant against state power. None are designed to make convictions easier and taken together they clearly indicate that in our system the entire burden of proving criminal activity rests on the state. The defendant, under our constitution, need not do anything at all to defend himself, and certainly cannot be required to help convict himself. Rather he has an

> absolute, unqualified right to compel the state to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the state at every point to: "Prove it!"

399 U.S. 78, 112, 90 S.Ct. 1893, 1912, 26 L.Ed.2d 446, 483 (Black, J., dissenting).

Justice Black's argument for the rights of an accused has not, for the most part, been followed by other federal and state courts. More and more, there have been declarations that a criminal trial is a "search for truth," that criminal trials are not a game of surprise, and that the right of discovery is a "two way street." Montana has followed that tack since Sikora. It is clear that the accused must give the State pretrial notice of affirmative defenses, and produce for the State a list of the witnesses he will call to establish the defense.

The question that remains regarding witnesses is whether the defendant must also make a pretrial disclosure of witnesses that he will call in his general defense of the crime charged. Immediately, the Sikora ruling comes to the fore: the defendant is merely revealing in advance of trial what eventually he would have to reveal during the trial. Under the order of the court in this case, and under the statute, Carkulis does not have to reveal to the State whether he as a defendant will or will not take the stand in his defense. The requirement is not self-incriminatory as to him. With respect to other witnesses for his general defense, the logic of Sikora and Williams seems to apply: their names will be revealed in due course in any event. It is certain that if, without prior disclosure, a devastating surprise witness for the

defendant were to testify, the State would obtain from the trial judge a continuance in order to meet the testimony. Pretrial revelation may avoid surprise, aid the administration of the trial courts and provide an orderly resolution of the charge. On those grounds, and because we see protections for the defendant in other provisions of the discovery statutes, we hold that the defendant must provide to the State a list of all witnesses he intends to call at the trial. The District Court subjected this requirement to "constitutional or statutory limitations."

We turn now to the question of whether the defendant must also surrender to the State copies of statements obtained by the defendant or his agents and counsel statements of all witnesses he will call at trial.

The State contends that the discovery

statutes requiring copies of statements merely provide for the accelerated production of evidence that the defendant would voluntarily and without compulsion provide at trial. The State also argues that the protections provided by the Fifth Amendment and Art. II, §25 of the Montana Constitution apply only to the statements of a criminal defendant. The privilege does not extend to the testimony or statements of third parties. Therefore, the State contends that the provisions of §§46-15-323(3) and (4), MCA, are constitutionally sound.

Carkulis and amici contend, however, that the production of such items may be incriminating in that they could provide the State with a "link in the chain" of evidence sufficient to establish a prima facie case. That, they contend, would have the effect of lessening the burden of beyond a reasonable doubt and in effect

violate the accused's right to remain silent.

In considering the question of pretrial production by an accused of prospective witness statements relating to his general defense, we are leading into a field where there is little authority to guide us. For one thing, there is a critical difference between the discovery and inspection rules provided under the federal system and those of the Montana criminal discovery statutes. Under Rule 16, Fed.R.Crim.P., any discovery must first be defendant triggered. Discovery from the defendant as to documents and tangible objects, and reports of examination and tests, are permitted only if defendant has requested from the government the same kinds of disclosure. Rule 16(b)(1)(A), (B), Fed.R.Crim.P. Except for these, the federal rule does not authorize the discovery or inspection

of reports, memoranda or other internal defense documents made by the defendant or his attorneys in connection with the investigation or defense of the case, or statements made by the defendant or by government defense witnesses or by prospective government or defense witnesses. Rule 16(b)(2), Fed.R.Crim.P. In fact, the Congress specifically declined to provide for the discovery of witness lists in Rule 16. Moore's Federal Practice (1986 Rules Pamphlet at 231).

In addition, Rule 12.1, Fed.R.Crim.P. provides for a notice of alibi, but it is government triggered. Rule 12.1 requires the government to provide the defendant with a demand stating the time, date and place where the alleged offense was committed whereupon the defendant must serve within 10 days a notice of intention to offer the defense of alibi and within an additional 10 days provide a list of

the names of witnesses who establish the alibi. The defendant must also state the specific place at which he claims to have been at the time of the alleged offense. Montana's statutes have no such provisions.

Thus, the State has relied on a number of cases from the federal system which are not on point. In those cases, the defendants are not required to produce statements until the government has completed its case and if the statements are being used by the defendant in his defense or to impeach a witness. See, for example, United States v. Nobles (1975), 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141.

Two sister states have refused to permit a pretrial disclosure of witness lists or statements. One is Alaska, expressing its decision in Scott v. State (Alaska 1974), 519 P.2d 774. There the

Superior Court, apparently without direct statutory authority, had required a defendant charged with rape to disclose to the prosecution the names of all prospective defense witnesses other than the defendant himself, the production for inspection and copying of any written or recorded statements of those witnesses, and advance notice of an alibi defense. The defendant sought interlocutory appellate review in the Alaska Supreme Court which was granted. The Supreme Court struck down the Superior Court order, including the requirements relating to the alibi defense. The Alaska Supreme Court decided to interpret the Alaska Constitution more broadly than the United States Supreme Court construed the Fifth Amendment in Williams v. Florida, supra. It determined that the pretrial transfer of witness lists and witness statements was testimonial because a document

containing such facts transmitted from one party to another constituted a communication of cognizable information from one source to another. The Supreme court was of the opinion that such information may in some instances tend to be incriminating; and because a court order was involved, it found that the production was compelled. Thus, in the opinion of that Supreme Court, the criteria for self-incrimination was met in the Superior Court order.

At odds with the Alaska decision in Scott v. State, supra, is the rationale of the District Court in Carkulis' case. While agreeing that the protection against self-incrimination applies to testimonial or communicative evidence, State v. Armstrong (1980), 189 Mont. 407, 421, 616 P.2d 341, 349, the District Court held that the disclosure required by the court order was not compelled, State v. Anderson

(Mont. 1984), 686 P.2d 193, 197, 41 St.Rep. 1357, 1360. The District Court held that there was no compulsion in the Montana statute because Carkulis was not compelled to reveal that which he did not intend to reveal at trial anyhow.

California also held against the disclosure of witness lists and statements in In Re Misner (Cal. 1985), 698 P.2d 637. In that case the California history of prosecutorial discovery (advocated by the late J. Traynor) was examined, beginning with Jones v. Superior Court (Cal. 1962), 372 P.2d 919; through the backing away from Jones in Prudhomme v. Superior Court (Cal. 1970), 466 P.2d 673; down to the facts before it in Misner. That case involved the constitutionality of a statute which permitted the prosecution to discover from the defendant or his counsel, following testimony under direct examination of defense witnesses other

than the defendant, other statements made by those witnesses. The California appellate court examined Williams v. Florida, supra, and United States v. Nobles, supra, but rested its decision on California state law. It determined that the California statute was directed only to prior statements of witnesses produced by the defense and though limited to the scope of their direct testimony, the statute obviously contemplated that the discovery permitted by the statute would provide the state with evidence to impeach the defense witnesses. Misner determined that it violated a defendant's privilege against self-incrimination to extract impeachment evidence from him.

Further in Misner, the prosecution argued that even if the privilege against self-incrimination covered prior statements of defense witnesses, the defendant waived the privilege by putting

the witnesses on the stand, at least to the extent of the permissible scope of cross examination. The California Supreme Court said the state could not rely on this rule, stating:

> . . . while it may be true that by putting witnesses on the stand the defendant waives any right to object to their vigorous cross examination by the prosecution, he does not waive his right to refuse to supply the prosecution with the means to conduct that cross examination.

698 P.2d 637, 647.

Within the last quoted sentence of the Misner court, we find the kernel of difference between California law and Montana law in this subject. In Sikora, supra, we quoted with approval (admittedly dictum, but bearing on the Montana view of the law) from People v. Damon (N.Y. 1969), 247 N.E.2d 651, as follows:

> "It is argued first that there was a possible violation of the right against self-incrimination. We do not agree. These statements were not those of the defendant but of

> witnesses offered by the defendant. In no sense can it be said that he is being compelled to produce incriminating statements of his own. The privilege against self-incrimination applies only to evidence of a testimonial or communicative nature obtained from the defendant himself."

154 Mont. 241, 249, 462 P.2d 897, 901.

While admitting the question is close, and with deference to sister states holding otherwise, we hold that the pretrial disclosure by the defendant of statements of witnesses he intends to call at trial does not offend his rights against self-incrimination under state or federal grounds. Undoubtedly at trial time, such statements would be used to refresh the recollection of defense witnesses. As such they ought as well to be available to the state. Our holding is also based on the reciprocity provided in the state's statutes, and on the limitation of disclosure to those statements only of witnesses defendant

intends to call at trial.

Disclosure of Statements of Experts

What is said foregoing applies with equal force to pretrial disclosure of prospective experts as witnesses. There is however, a necessary caution to be stated.

In the preparation of and the examination by such experts, the defendant may be encouraged to communicate freely and candidly with them. Thus experts' reports, notes and other written materials may contain potentially incriminating information to which the state should not be entitled. Malloy v. Hogan (1964), 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. Particularly, the reports of psychologists and psychiatrists may contain such incriminatory statements.

In ordering the exchange of disclosure of statements of expert witnesses therefore, it may be expedient

for District Courts to weigh the issues of self-incrimination carefully under the protective procedures hereafter discussed.

It is noted that in this case the order of the court is carefully limited. Carkulis is ordered to give summaries only of the testimony he expects the expert witnesses to give at trial.

Disclosure of Documents

Carkulis has been ordered by the District Court to disclose to the state "all papers, documents, photographs, and other tangible objects" which he in good faith knows will be used as exhibits at the trial.

Carkulis claims that this order violates the Fourth Amendment of the

Federal Constitution[4], and Art. II, §11[5] of the 1972 Montana Constitution.

Carkulis contends that the order is a compulsory production of documents and so it violates his Fourth Amendment rights within the meaning of Boyd v. United States (1886), 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746. He argues that the seizure is void because the description of the

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4 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Fourth Amendment to the United States Constitution.

5 "The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing." Art. II, §11, 1972 Montana Constitution.

place to be searched and things to be seized is not made with particularity, that the request is not made on probable cause, and that it is not made on written affirmation. Art. II, §11, 1972 Montana Constitution.

The State counters that the authority of Boyd v. United States, supra, has been diminished, and there is no authority to support Carkulis that the Fourth Amendment applies to pretrial discovery.

The case which the State contends watered down the holding of Boyd, supra, is Hale v. Henkel (1906), 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652, wherein it was stated that "the Fourth Amendment was not intended to interfere with the power of Courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence." However, the United States Supreme Court also said in Hale that an order for the production

of book and papers may constitute an unreasonable search and seizure within the Fourth Amendment whether the seizure occurred under a search warrant or a subpoena duces tecum. In Hale, the Supreme Court decided that the subpoena duces tecum was far too sweeping because of the vast extent of documents required to be produced from many different places under the subpoena.

Here the order of the court is moderate in comparison to the subpoena duces tecum in Hale. Carkulis is required to produce, for examination or reproduction, papers, documents, photographs, and tangible objects which he "in good faith knows will be used as exhibits at trial." The order in its terms is definitive, and cannot be a burden upon the defendant, since he will use those same objects at trial. In consideration of the language used by the

District Court order, we hold it meets the test of reasonableness, under Fourth Amendment tests, and is equally amenable to Art. II, §11 of the 1972 Montana Constitution. Carkulis' arguments that the place to be searched or the things to be seized or that probable cause has not been set forth nor supported by oath or affirmation, are state constitutional requirements for the issuance of a warrant. In this pretrial discovery procedure, the use of a warrant is not involved. For the efficient administration of justice, the court's order here is directed to the production of objects for examination and reproduction which must eventually come to light at trial. Even if the order for production is regarded as a seizure of sorts, it is nevertheless reasonable. The constitutional prohibitions are against unreasonableness.

Due Process

Carkulis argues that the imposition of sanctions if he fails to abide by the discovery order of the District Court deprives him of due process. The due process provision of the Fifth Amendment is applicable to state action through the Fourteenth Amendment. Malloy v. Hogan (1964), 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653.

The grinding surface of the due process question in this type of issue is whether reciprocity for discovery exists. In Williams v. Florida, supra, the United States Supreme Court indicated that nothing in the due process clause precludes any states from using broad discovery procedures designed to increase evidence available to both sides in criminal cases and to enhance goals and fairness in the adversary system. In Wardius v. Oregon (1973), 412 U.S. 470, 93

S.Ct. 2208, 37 L.Ed.2d 82, the United States Supreme Court reaffirmed this point in reversing a conviction of an Oregon defendant based on an Oregon statute. The Oregon defendant had not given notice to the prosecution that he intended to use the defense of alibi and at trial his alibi witness as well as his own testimony was stricken. He appealed his conviction on the ground that he had been deprived of due process because under the Oregon statute there is no provision for reciprocal discovery, that is that the accused had not the same rights of pretrial discovery as did the State. The U.S. Supreme Court held that the Oregon statute did not provide reciprocal rights of discovery and that thereby due process was violated.

The statutes now enacted in this State relating to pretrial discovery in criminal cases provide for full discovery

within constitutional and privilege limitations to both sides. After this Court approved the requirement that the defendant give notice of an alibi defense in Sikora, supra, the case went back to the District Court where the defendant, Radford, was convicted. He brought an action for habeas corpus in the federal system, in the United States District Court for the District of Montana. There the United States district judge upheld the notice of alibi statute and he was affirmed on appeal in the Ninth Circuit. Radford v. Stewart (9th Cir. 1973), 472 F.2d 1161, 1162. The the circuit court said:

> The State operated in good faith in this action and did not use the discovery required merely to build its case. No investigation was made of the witnesses named by the defendant. In fact, defendant was allowed, without objection, to call two witnesses whose names had not been noticed. Defendant also knew prior to trial of the prosecution's only rebuttal witness (a

psychiatrist). Judge Battin thus found that under the facts of this case reciprocity existed.

Since under the cases due process in this kind of case hinges on reciprocity, and reciprocity is provided in the statutes, Carkulis' due process argument falls.

This Court noted the presence of reciprocity in the statutes which were precursors to the present pretrial discovery statues as providing due process in State v. Bentley (1970), 155 Mont. 383, 472 P.2d 864.

Obligation of Defense Counsel Work-Product-

The order of the District Court for pretrial discovery is binding not only upon Carkulis himself, but upon his agents and attorneys. Questions arise as to the impact of such an order upon the attorney-client relationship and its effect upon the work-product rule.

First, the work-product rule. It is

a qualified evidentiary privilege recognized in Hickman v. Taylor (1947), 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed 451. The work-product rule is different from the attorney-client privilege. The latter protects communications between the client and his attorney or the attorney's agent. The work-product doctrine protects against the disclosure of specific documents and tangible items prepared in actual anticipation of litigation or for trial. The exemption from discovery is intended to insure the privacy of a party's attorney from unnecessary intrusion by opposing parties or counsel. However, the "privilege" is not absolute. It is not personal to the client. It can be waived by an attorney's course of conduct. See People v. Small (Colo. 1981), 631 P.2d 148, 159.

There is no doubt that if an attorney uses at trial a statement he obtained and

prepared in anticipation of litigation in interrogating or cross examining a witness, the full statement, even though work-product, must be produced at the demand of the other side. See People v. Small, supra. By the use of the statement at trial, the attorney has waived the work-product protection, since the material in the statement has become substantive evidence. On this ground Justice Bryon R. White specially concurred in Williams v. Florida, supra, he contended that the work-product rule does not apply to evidence, and therefore no waiver of work-product rule by the attorney was involved. The majority in Williams held the attorney had waived the work-product rule by using the statement to impeach on cross-examination. In any event, the statement becomes discoverable when used at trial.

The order of the District Court in

this case was tailored to require the plaintiff and his counsel and agents to produce all documents and tangible objects which the defendant in good faith knows will be used as an exhibit at the trial. If the defendant knows that such objects will be used at trial, whether we regard the same as evidence, or the use of them as a waiver of the work-product doctrine, since they are discoverable in any event, the timing of the discovery is the only question involved. The logic of Williams, that "accelerated disclosure" is permissible if the objects will come to light in any event applies here. If counsel, in representation of this client, acquires work-product objects which the defendant knows in good faith will not be used at trial, they are not subject to discovery under the order of the court. Further, they are protected by the provisions of §46-15-332, MCA, that all

matters which are privileged upon the trial are privileged against disclosure in the discovery procedure.

A close question may arise in some instances as to whether observance of the discovery order by a defendant's attorney in the production of documents or tangible objects would in themselves incriminate his client. It appears to us that there are safeguards in that a protective order may be sought under §46-15-328, MCA, as we will hereafter discuss.

Excision and Protective Orders

Section 46-15-328, MCA, allows any party to obtain orders denying, deferring, or regulating pretrial discovery. The statute provides for excision of nondiscoverable material and for applications to the district court in camera for protective orders.

Carkulis contends that §46-15-328, MCA, violates his right against self-

incrimination because subsection 3 requires the counsel of both parties be present during all protective order presentations.

"A statute derives its meaning from the entire body of the words, taken together." Wyse v. District Court of Fourth Judicial District (1981), ____Mont. ____, 636 P.2d 865, 866. Section 46-15-328(1), MCA, gives the District Court the power to regulate disclosure:

> (1) Upon a motion of any party showing good cause, the court may order . . . that any other disclosure as required by sections 46-15-321 through 46-15-329(b) . . . be . . . regulated when it finds:
>
> (b) that the risk cannot be eliminated by a less substantial restriction of discovery rights.

It is possible for occasions to arise where applications for protective orders are made to the court, and where if counsel for all parties are present, "the cat is then out of the bag, never to be

recaptured." Subsection 1 in the statute gives the court the flexibility to employ appropriate protection procedures. The provisions of subsection 3, that the court may permit the moving party to present the material or information for the inspection of the judge alone in the presence of all counsel, merely provides one method of accomplishing the legislative purpose. It is not exclusive. It does not exclude ex parte presentations. The District Court can exert its judicial authority in its adjudicatory function so as to protect constitutional and statutory rights.

Among the inherent powers of the court is "the right of the court to receive information in private so that it can intelligently assess its adjudicatory function." Phoenix Newspapers, Inc. v. Superior Court (Ariz. 1983), 680 P.2d 166, 169. The determination of whether material is discoverable or not is a

necessary facet of the adjudicatory function. People v. Stevens (Ill. 1981), 430 N.E.2d 331, 333.

The United States Supreme Court has never squarely addressed the issue of in camera hearings conducted ex parte. Yet, it has seen fit to approve of such procedure by implication. See Taglianetti v. United States (1969), 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (approving of in camera inspection of unlawful electronic surveillance case as not being violative of the Fourth Amendment where the defendant was provided with all tapes in which he took part in the conversation.); Dennis v. United States (1966), 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (recognition of in camera procedure when national security or clear-cut threat to individuals is identified).

While the 1975 Amendments to the

Federal Rules of Criminal Procedure were pending, the United States Supreme Court proposed a mandatory ex parte proceedings upon request of a party seeking a protective order. Moore's Federal Practice, Section 1604 at 16-63. The House of Representatives changed the mandatory language to permissive in order to prevent burdening the trial courts. The amended proposal was codified in Rule 16(d)(1), Fed.R.Crim.P.

It provides:

> Protective and modifying orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as appropriate upon motion by a party. The court may permit the party to make such a showing in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order to grant relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Not all protective order requests will require the use of the ex parte procedure. Ex parte proceedings are generally disfavored and are not to be employed lightly. The procedure would be appropriate only if an adversary hearing would defeat the purpose of the order sought.

Sanctions Fair Trial

The sanction applied by the District Court in its order for disclosure is that if the materials are not disclosed, the defendant will be precluded from offering the same at trial.

Carkulis argues that the imposition of such a sanction deprives him of the right to present a defense and thus

violates the Sixth Amendment[6] of the Federal Constitution and Art. II, §24[7] of the Montana Constitution.

Carkulis argues that the Sixth Amendment is a guaranty to an accused of a right to call witnesses in his favor,

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6 "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the Assistance of counsel for his defense." Sixth Amendment to the United States Constitution.

7 "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed . . ." Art. II, §24, 1972 Montana Constitution.

without qualification or restraint. Washington v. State of Texas (1967), 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, 1023. The State relies on Rowan v. Owens (7th Cir. 1984), 752 F.2d 1186, 1191, which held that to prevent the witness from testifying is not a per se unreasonable interference with the defendant's right to defend himself. Again, in U.S. v. Nobles, supra, it was held that the Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; "one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth."

Once it is determined, as we have determined here, that reciprocal pretrial disclosures subject to constitutional or statutory limitations are permissible, it goes hand in hand with that determination

to say that the District Court may exercise its judicial discretion in enforcing such permissible disclosures.

We do not in this opinion pass upon the appropriateness of the sanctions set forth in the District Court in the Carkulis case, for the reason that the sanctions have yet to be applied. See State v. Fendler (Ariz. App. 1980), 622 P.2d 23, 41, for a discussion of appropriate sanctions.

Application of Section 46-15-323(3)

We find no substance in Carkulis' argument that before §46-15-323(4) can be operative, defendant must have acted under subdivision (3) of that statute.

Disposal

Accordingly, we have considered Carkulis' petition under our power of supervisory control. Upon consideration the application of Carkulis for a writ of supervisory control directed to the

District Court is DENIED, and these proceedings are dismissed.

/s/ JOHN C. SHEEHY
Justice

We Concur:

/s/ J.A. TURNAGE
Chief Justice

/s/ JOHN CONWAY HARRISON

/s/ FRED J. WEBER

/s/ L.C. GULBRANDSON

/s/ R.C. MCDONOUGH
Justices

Mr. Justice William E. Hunt, Sr., dissenting:

I dissent from the majority's holding that before the trial the defendant in a criminal proceeding must make available to the prosecution a list of witnesses and exhibits expected to be used at trial. To do this is to go one step further to make the government more powerful than its citizens.

Our government was founded as a reaction to the oppressive and tyrannical actions of the British government in the eighteenth century. The founding fathers knew of the abuses of human rights that easily coupled with an overly authoritarian government and sought to protect the citizens of their newly formed nation-state by a recognition of certain inalienable rights enumerated in the Bill of Rights. Now we seem to be captivated by the idea of efficiency at the expense of safety.

As Justice Black stated in his dissent in Williams v. Florida (1970), 399 U.S. 78, 112, 26 L.Ed.2d 446, 483, 90 S.Ct. 1893, 1912:

> All of these rights are designed to shield the defendant against state power. None are designed to make convictions easier and taken together they clearly indicate that in our system the entire burden of proving criminal activity rests on the State.

He continues:

> [The founding fathers] were well aware that any individual might some day be subjected to criminal prosecution, and it was in order to protect the freedom of each of us that they restricted the Government's ability to punish or imprison any of us.

Williams, 399 U.S. at 116 (dissenting op.).

The effect of the majority opinion is to sacrifice constitutional rights for the sake of "efficient administration of justice." In doing so it gives in to the rhetoric we often hear that the courts are

to blame for the increasing crime problem in this country and that only a "hardline" approach by the courts will solve the problem. Whatever the cause of our increasing crime it is not an inefficient judicial or procuratorial system. In 1985, the prisons in the United States contained twice as many detainees as the United Kingdom's, four times as many as France's and eight times as many as Portugal's. Encyclopaedia Britannica, Book of the Year (1986) at 188. Chief Justice Wachtler of the New York Court of Appeals has said in a talk in Montana last July that New York alone has 40,000 prison inmates, up 26,000 from 1975. The Montana Lawyer, September, 1987, at 3. According to the Annual Report of the Department of Institutions, Montana has increased its prison population by an average of 376 in 1976 to 937 in 1987. Conversation with officials of the Montana Department of

Institutions (November 23, 1987). These are not the numbers of an inefficient court system that require citizens to surrender rights for additional productivity.

In any event,

> [T]he Framers decided that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in "efficiency" that resulted. Their decision constitutes the final word on the subject, absent some constitutional amendment. That decision should not be set aside as the Court does today.

Williams, 399 U.S. at 114 (J. Black, dissenting op.).

Justice Black accurately predicted how the Williams holding would be expanded by the state courts to force the defendant to assist in the prosecution of his own case. It is not just the defendant but all of us who have lost ground today in the struggle between state control and individual freedom.

/s/ WILLIAM E. HUNT
Justice

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

STATE OF MONTANA,	)	No. DC 84-204
	)	
Plaintiff,	)	
	)	
-vs-	)	**O R D E R**
	)	
JAMES CARKULIS,	)	
	)	
Defendant.	)	

This matter came up for hearing on December 18, 1985, on the State's motion for discovery pursuant to §46-15-323(4) M.C.A. Counsel for the State and the defendant appeared and submitted briefs. Having considered the matter fully,

IT IS HEREBY ORDERED that the defendant, James Carkulis and his counsel or agents, make the following materials and information available to the State without delay for examination and reproduction, subject to constitutional or statutory limitations:

(1) the names and addresses of all persons, other than the defendant, whom he in good faith knows he will call as witnesses at trial, and copies of all statements made by them related to this case;

(2) the names and addresses of any expert witnesses whom he in good faith knows he will call at trial, and summaries of the testimony he expects the witnesses to give at trial;

(3) all papers, documents, photographs and other tangible objects which the defendant in good faith knows will be used as exhibits at trial; and

IT IS FURTHER ORDERED that the defendant shall promptly notify the State of the existence of any additional information or material referred to in the foregoing that is discovered by the defendant after this Order and make such information or material available for

examination and reproduction without delay.

Dated this 20th day of DECEMBER, 1985.

/s/ G. TODD BAUGH
District Judge

cc: Terence Swift
Jeffrey Renz and Allen Beck

(Certificate of Service omitted in printing)

IN THE SUPREME COURT
OF THE STATE OF MONTANA
No. 86-026

STATE OF MONTANA ex
rel. JAMES CARKULIS,

Relator,

v.

DISTRICT COURT OF THE THIRTEENTH
JUDICIAL DISTRICT OF THE STATE OF
MONTANA, IN AND FOR THE COUNTY OF
YELLOWSTONE, HONORABLE G. TODD
BAUGH, Presiding,

Respondent.

ORDER DENYING SUPERVISORY CONTROL

James Carkulis, as Relator, has filed a Petition for Writ of Supervisory Control supported by brief and amicus curiae briefs have been submitted by the Montana County Attorney's Association, the Moses Law Firm, and the Ungar Law Office.

Carkulis has been charged with felony forgery in Yellowstone County District Court. Pursuant to the criminal discovery statutes enacted in 1985, §46-15-321-329,

MCA, the District Court ordered Carkulis, his counsel or agents, to make the following materials and information available to the State for examination and reproduction subject to constitutional or statutory limitations:

> (1) the names and addresses of all persons, other than the Defendant, whom he in good faith knows he will call as witnesses at trial, and copies of all statements made by them related to this case;
>
> (2) the names and addresses of any expert witnesses whom he in good faith knows he will call, and summaries of the testimony he expects the witnesses to give at trial;
>
> (3) all papers, documents, photographs, and other tangible objects which the Defendant in good faith knows will be used as exhibits at trial;

The court further ordered Carkulis to promptly notify the State of the existence of any additional information or material discovered after the order and to make such information or material available for

examination and reproduction without delay.

Due to the fact that no sanctions have been imposed, and may never be imposed, on Carkulis for his failure to comply with the statutes, an adequate factual record has not been established upon which we can make a final determination. We conclude there is an adequate remedy by appeal.

IT IS ORDERED that the Petition for Writ of Supervisory Control is denied without prejudice. The Clerk of this Court is directed to mail copies hereof to counsel of record and to the Honorable G. Todd Baugh, District Judge.

DATED this 11th day of December, 1986.

/s/ J.A. TURNAGE
Chief Justice

/s/JOHN CONWAY HARRISON

/s/ FRED J. WEBER

/s/ JOHN C. SHEEHY

/s/FRANK MORRISON, JR.

/s/ R.C. MCDONOUGH

/s/ WILLIAM E. HUNT
Justices

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

STATE OF MONTANA, Plaintiff, -vs- JAMES CARKULIS, Defendant.	)	No. DC 84-204 **MEMORANDUM AND ORDER**

Before the court is defendant's motion to reconsider the court's order dated December 20, 1985, requiring disclosure of evidence defendant will introduce at trial. The matter having been submitted on briefs and the court being fully advised in the premises,

IT IS HEREBY ORDERED that defendant's motion to reconsider is denied; and

IT IS FURTHER ORDERED that defendant shall disclose the materials set out in the December 20, 1985 order by May 1, 1987, or be precluded from offering same at trial.

DATED this 9th day of APRIL, 1987.

/s/ G. TODD BAUGH
District Judge

cc: Terry Swift
Allen Back and Jeff Renz

MEMORANDUM

The State moved the court, through M.C.A. §46-15-323(4) (1985), for an order requiring defendant to make available the items listed in that statute. Defendant responded in a brief raising potential constitutional violations. After reading the briefs the court granted the motion for discovery on December 20, 1985. The Montana Supreme Court denied a petition for writ of certiorari or supervisory control. The defendant now moves this court to reconsider its December 20, 1985, order.

This matter arises out of the unfortunate wording chosen by the 1985 Legislature in adopting M.C.A. §46-15-323

(1985). The statute describes four types of evidence. In Subsection (1) the statute sets out non-testimonial evidence the defendant must produce on request. Subsection (3) sets out evidence in support of defenses which the defendant must produce if he pleads particular defenses. It is argued that Subsection (4) may cover either further evidence in support of the defenses discussed in (3) or may cover evidence and witnesses in support of the defendant's general case. Subsection (6) covers material -not otherwise provided for. Subsection (3) and (4) only covers witnesses to be called and evidence to be introduced at trial. Subsection (6) covers matters necessary for the preparation of the prosecutor's case. Subsections (3) and (4) require that the materials be produced without a request by the State.

In this case, Subsection (3) is not

an issue as none of the defenses listed there are raised. The State has not asked for discovery to prepare its case therefore (6) is not at issue. Subsection (1), non-testimonial evidence, has also not been raised.

In this case the two issues involve interpretation of Subsection (4). Does it apply only when defenses are raised under Subsection (3)? Does discovery of names, addresses and statements of witnesses in support of defendant's general case violate defendant's Fifth Amendment right against self incrimination?

The first problem is to examine Subsection (4) to determine what the legislature meant by "Simultaneously with the notice of defenses submitted under Subsection (3) . . . ." The defendant argues that the legislature meant to further define the matters which must be produced under (3); the defendant believes

that raising an affirmative defense is a prerequisite to disclosure under (4). The State presents no argument.

Other jurisdictions have broken defense witnesses into three categories: expert witnesses, general witness for the defense, and witnesses pertaining to specific affirmative defenses. See Colorado-Crim.P.Rule 16 II, Washington-Cr.R.4.7(b), Missouri-R.S.Mo.Cr.R. 25.34(A)(2) and (5).

Montana, following Arizona Crim.P.Rule 15, has also divided the defense witnesses into those groups: experts under (4)(b); general witnesses under (3). It is clear that reading (4) as merely a clarification of (3) is not the proper interpretation of the statute in light of other jurisdictions' statutes. The "Simultaneously with . . ." wording simply is an awkward way of saying the disclosure of evidence under (4) must

occur "within 30 days of the arraignment", the same time requirement for disclosure in (3). Subsection (4) addresses witnesses and evidence relating to the general defense theory, not a specific affirmative defense. There is no prerequisite to disclosure under (4) as argued by the defense. The materials listed in subsection (4) are to be disclosed by the defendant even without a request from the state.

However, the disclosure required under (4) is not unlimited. The trend toward broadened reciprocal discovery in criminal cases has always been limited by the defendant's constitutional rights, specifically the privilege against self incrimination, in the Fifth Amendment of the United States Constitution and Article II, Section 25 of the Montana Constitution.

The Montana Supreme Court has held

that the self-incrimination privilege granted by the state constitution "affords no broader protection" than the Fifth Amendment privilege. State v. Jackson, 672 P.2d 255, 258 (1983). The opinions of the United States Supreme Court delineate the maximum breadth of the privilege in Montana. Id.

To fall within the protection against self-incrimination the evidence must be testimonial or communicative, State v. Armstrong, 616 P.2d 341, 349 (MT 1980), citing to Schmerber v. California, 384 U.S. 757 (1966), and must be compelled, State v. Anderson, 686 P.2d 193, 197 (MT 1984).

The statements of witnesses may be considered testimonial. Richardson v. District Court, 632 P.2d 595, 599 (CO 1981). (Colorado courts have not addressed whether discovery of such statements infringes on the Fifth

Amendment because the Colorado statute does not give the court authority to order disclosure of such statements. Id. Colo.Crim.P.Rule 16 II.). This court will not address whether the statements are testimonial as the second requirement for self-incrimination, compulsion, is not met.

The Montana Supreme Court has held that information or arguments submitted to the court in a trial brief, which brief was then given to the prosecutor, was not compelled because the brief's subject matter was to be freely offered and elaborated upon at trial. Anderson at 197. Compulsion exists when the state acquires or demands testimony that would not otherwise be divulged by the defendant at trial under threat of certain non-criminal sanctions such as loss of economic benefit or future employment, deprivation or associational rights, or

forfeiture of present social or economic position. Lefkowitz v. Cunningham, 431 U.S. 801, 807-08 (1977). See also Ryan v. State of Montana, 580 F.2d 988, 990 (1978).

There is no compulsion in the Montana statute because defendant is not compelled to reveal that which he does not intend to reveal at trial anyway. The sanctions for not providing the evidence listed in §46-15-399 include an order for disclosure, a continuance, contempt, exclusion of the evidence or a mistrial.

It is clear that disclosure of witness names and statements to be used at trial is not compelled evidence. Because information is not compelled, there can be no violation of the privilege against self-incrimination.

The Washington Supreme Court in applying a disclosure statute very similar to Montana's held that the disclosure did

not infringe on the self-incrimination privilege. State v. Nelson, 545 P.2d 36 (WA 1975). The Nelson court first quoted Williams v. Florida, 399 U.S. 78 (1970), in which the Supreme Court held that disclosure of names and addresses of witnesses in support of the alibi defense did not violate the Fifth Amendment.

> In the case before us, the notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial.

Williams at 85. The Williams court reasoned that pretrial disclosure would help to avoid disrupted trials without offending a criminal's basic rights.

The Nelson court also referred to Wardius v. Oregon, 412 U.S. 470 (1973), in

which the Supreme Court held that a statute must include reciprocal discovery provisions to provide due process. M.C.A. 46-16-322 requires reciprocal discovery, and therefore meets the Wardius requirement.

The Nelson court held that the rationale of Williams and Wardius, as applied equally to a forced pretrial disclosure of the more general information provided for in Washington Criminal Rule 4.5. "These are all matters which must ultimately come to light should the defendant choose to proceed with a defense. The rules simply accelerate the timing of his disclosure. The purpose of the rule is to present last minute surprise with its trial disruption and continuance . . . Neither do our criminal practice discovery procedures offend against due process. They provide for the type of reciprocal discovery [required by

Wardius]" 545 P.2d at 39-40.

The Montana criminal disclosure statute is nearly identical to Washington's. Montana's self-incrimination privilege extends only as far as the Fifth Amendment. The Fifth Amendment as defined in Williams and Wardius, and explained in Nelson, allows disclosure of names, addresses and statements of witnesses to be called at trial in support of defendant's general case. The statute, M.C.A. §46-15-323(4), limits disclosure to those witnesses the defendant will call at trial, "together with all statements made by them in connection with the particular case". Allowing pretrial discovery of this evidence merely accelerates the time of disclosure.

It is possible that defendant will not know what evidence will be presented very long before trial. As soon as

defendant and counsel do know what witnesses will be called, their names, addresses and statements must be disclosed to the prosecutor.

DATED this 9th day of APRIL, 1987.

/s/ G. TODD BAUGH
District Judge

(Certificate of Service omitted in printing)

IN THE SUPREME COURT
OF THE STATE OF MONTANA
No. 87-164

STATE OF MONTANA ex
rel. JAMES CARKULIS,

Relator,

v. **ORDER**

DISTRICT COURT OF THE THIRTEENTH
JUDICIAL DISTRICT OF THE STATE OF
MONTANA, IN AND FOR THE COUNTY OF
YELLOWSTONE, HONORABLE G. TODD
BAUGH, Presiding,

Respondent.

The petition for rehearing is denied.

DATED this 5th day of January, 1988.

/s/ J.A. TURNAGE
Chief Justice

/s/ JOHN CONWAY HARRISON

/s/ FRED J. WEBER

/s/ L.C. GULBRANDSON

/s/ JOHN C. SHEEHY

/s/ R.C. MCDONOUGH
Justices

Mr. Justice William E. Hunt, Sr., would grant a rehearing.

IN THE SUPREME COURT OF THE

STATE OF MONTANA

STATE OF MONTANA ex rel. JAMES CARKULIS, Petitioner, v. DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT MONTANA, IN AND FOR THE COUNTY OF YELLOWSTONE, HONORABLE G. TODD BAUGH, Presiding, Defendant.	)	No. 87-164 **NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that James T. Carkulis, Petitioner above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Montana, affirming the order of the district court of the Thirteenth Judicial District, entered herein on January 5, 1988.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED this 29th day of February,

1988.

ALLEN BECK
724 Grand Avenue
P.O. Box 21253
Billings, MT 59104

JEFFREY T. RENZ
724 Grand Avenue
Billings, MT 59101

By: /s/ JEFFREY T. RENZ
Attorney for
Petitioner

(Certificate of Service omitted in printing)

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

THE STATE OF MONTANA, Plaintiff, vs. JAMES CARKULIS, Defendant.	)	No. DC 84 203 **MOTION FOR DISCOVERY**

The State of Montana, by and through Terence M. Swift, Deputy County Attorney for Yellowstone County, moves the Court, pursuant to Section 45-15-323(4), MCA, for an Order requiring the defendant, meaning the defense including the defendant, his counsel and his agents, to make available for examination and reproduction without delay:

1.) the names and addresses of all persons, other than the defendant, whom he will call as witnesses at trial, together with copies of all statements made by them

related to this case;

2.) the names and addresses of any expert witnesses whom he will call at trial, together with the results of physical examinations and scientific tests, experiments or comparisons, including all written reports and statements made by them in connection with this case;

3.) all papers, documents, photographs and other tangible objects which the defendant will use at trial either as evidence or as a source of impeachment; and

4.) that the defendant be required to promptly notify the State of the existence of any additional information or material referred to in the foregoing discovered by the defendant subsequent to this motion, and to make such information or material available for examination and reproduction without delay.

Respectfully submitted this 4th day of December, 1985.

/s/ TERENCE M. SWIFT
Deputy County Attorney

(Certificate of Service omitted in printing)

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

THE STATE OF MONTANA, Plaintiff,	)	No. DC 84 203
vs.	)	**DEFENDANT'S RESPONSE TO MOTION FOR DISCOVERY**
JAMES CARKULIS, Defendant.	)	

I.

Plaintiff's request violates the fifth amendment to the United States Constitution.

A. Plaintiff's request violates his right not to be compelled in any criminal case to be a witness against himself.

1. Zurcher v. Stanford Daily, 436 U.S. 547, 98 S. Ct. 1970 (1978).

2. Emspak v. United States, 349 U.S. 190, 75 S. Ct. 687 (1955).

3. Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 (1964).

4. United States v. White, 322 U.S. 694, 64 S. Ct. 1248 (1944).

5. Hoffman v. United States, 341 U.S. 479, 71 S. Ct. 814 (1951) (Guarantee against self incrimination must be accorded liberal construction).

6. Plaintiff's request asks Defendant to identify all persons he will call as witnesses at trial. Such a pretrial request requires Defendant to identify witnesses whom he may not call at trial, but who may have evidence which is adverse to Defendant. Plaintiff also requests that Defendant produce all papers, documents, photographs, and other tangible objects which Defendant will use at trial either as evidence or as a source of impeachment. Again, Request requires Defendant to identify documents which might

incriminate him which, during the course of trial, he may decline to use.

II.

Plaintiff's Request violates the Defendant's rights to call witnesses on his own behalf as guaranteed by the sixth and fourteenth amendments to the United States Constitution.

A. Plaintiff's failure to list or identify trial witnesses, precludes him from calling witnesses on his own behalf at trial. Defendant may not determine the identity of witnesses he intends to call until the close of the State's affirmative case.

1. Washington v. State of Texas, 388 U.S. 14, 87 S. Ct. 1920 (1967). (Defendant has general right to place on stand any witness whose testimony would be relevant and material to defendant.)

III.

Plaintiff's request violates Defendant's rights secured by the fourth and fourteenth amendments to the United States Constitution.

A. Plaintiff's Request seeks the opportunity to examine and copy all papers, documents, photographs and other tangible objects which the Defendant will use at trial. Plaintiff's request is not based on probable cause. Plaintiff's request is not supported by an Affidavit. Plaintiff's request does not particularly describe the things to be seized for copying or examination, nor the location of the place to be searched.

1. Boyd v. United States, 116 U.S. 616, 618 (1886) (Striking down order to produce an invoice).

B. Again, Defendant will not know which documents or things, if any, he will use until the close of the State's case.

The State's request calls for an examination of physical evidence which is permitted only pursuant to a search warrant. The State's request for all papers, documents, photographs, and other tangible objects is a request for a general search warrant permitting the State to hold and copy items which the Defendant may not use at trial.

IV.

The State's Request exceeds the permissible scope of discovery in that it seeks the strategy and mental impressions of the Defendant's attorneys.

A. The State's Request requires the Defendant's attorneys to determine and advise the State of witnesses which it will call and documents and things which they will use at trial. These are matters which go directly to the strategy and tactics of the Defendant's counsel. It exceeds even the scope of discovery

permitted in civil cases.

1. Gidlewski v. Bettcher Industries, Inc., 38 F.R.Serv. 2d 664 (E.D. Pa. 1983) (parties may not request a statement of facts on which the opposing party intends to rely.)

2. Section 46-15-324(1), Mont. Code Ann. (1985).

V.

The State's Request exceeds the scope of Section 46-15-323, Mont. Code Ann. (1985).

A. The State also seeks impeachment documents not set forth in the statute.

B. The State fails to limit its request to constitutionally permissible documents. See, People v. District Court, 531 P.2d 626, (Colo. 1975).

VI.

The State's Request violates the Guarantees of Art. II, §11; 24; 25, Mont. Const. (1972).

CONCLUSION

For the foregoing reasons, the State's Motion should be denied.

DATED this 18th day of December, 1985.

ALLEN BECK
724 Grand Avenue
P.O. Box 21253
Billings, MT 59104

and

JEFFREY T. RENZ
724 Grand Avenue
Billings, MT 59101

Attorneys for Defendant

By /s/ JEFFREY T. RENZ

(Certificate of Service omitted in printing)

SOLECTIVE DESIGN SYSTEMS

1106 CENTRAL AVENUE
P.O. BOX 21344
BILLINGS, MONTANA 59104

LIEN WAIVER & RELEASE

FOR AND IN CONSIDERATION of the receipt of $10315.17 in payment from Billings Lumber for the following labor and/or materials furnished, to-wit: 3735 Ben Hogan Bergland the receipt and sufficiency of which is hereby acknowledged, the undersigned does hereby waive, release and relinquish any and all claims, demands and rights of lien for work done to Date: Feb. 27, 1984 for all labor, materials, machinery or other goods, equipment or services done, performed or furnished for the construction located at the site hereinafter described, to-wit:

The undersigned further warrants and represents that any and all valid labor and/or materials and equipment bills, now due and payable, on the property hereinabove described on behalf of the undersigned have been paid in full to date of this Release and Waiver, or will be paid from these funds and that there have been no change orders issued to the undersigned.

Tot l Subcontract _____

Total Paid 10315.17
(including above)

Balance Due -0-

Date: March 2, 1984

Name of Company

By /s/ Dick Laury

Title /s/ Manager

46-15-321. Definitions. As used in 46-15-321 through 46-15-329, unless the context requires otherwise, the following definitions apply:

(1) "Defendant" means the defense, including the accused, his counsel, and defense counsel's staff or investigators.

(2) "Make available for examination and reproduction" means to make material and information subject to disclosure available upon request at a designated place during specified reasonable times and provide suitable facilities or arrangements for reproducing it. The term does not mean that the disclosing party is required to make copies at its expense, to deliver the materials or information to the other party, or to supply the facilities or materials required to carry out tests on disclosed items. The parties may by mutual consent make any other or additional arrangements.

(3) "Statement" means:

(a) a writing signed or otherwise adopted or approved by a person;

(b) a mechanical, electrical, or other recording of a person's oral communications or a transcript thereof; and

(c) a writing containing a verbatim record as a summary of a person's oral communications.

(4) "Superseded notes" means handwritten notes, including field notes, that have been substantially incorporated into a statement. Such notes may no longer themselves be considered a statement.

46-15-322. Disclosure by prosecution. (1) Upon arraignment in district court or at such later time as the court may for good cause permit, the prosecutor shall make available to the defendant for examination and reproduction the following

material and information within his possession or control:

(a) a list of the names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief, together with their relevant written or recorded statements;

(b) all written or oral statements of the accused and of any person who will be tried with him;

(c) the names and addresses of experts who have personally examined the accused or any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons, including all written reports or statements made by them in connection with the particular case;

(d) a list or copies of all papers, documents, photographs, or tangible objects that the prosecutor will use at trial or that were obtained from or

purportedly belong to the accused; and

(e) all material or information that tends to mitigate or negate the accused's guilt as to the offense charged or that would tend to reduce his punishment therefor.

(2) At the same time the prosecutor shall inform the defendant of and make available to the defendant for examination and reproduction any written or recorded material or information within his possession or control regarding:

(a) whether there has been any electronic surveillance of any conversations to which the accused was a party;

(b) whether a search warrant has been executed in connection with the case;

(c) whether the case has involved an informant, and, if so, his identity if the defendant is entitled to know either or both of these facts under Rule 502 of the

Montana Rules of Evidence and 46-15-324(3).

(3) The prosecutor, upon written request, shall make available to the defendant for examination, testing, and reproduction any specified items contained in the list submitted under subsection (1)(d). The prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under this section.

(4) The prosecutor's obligation of disclosure extends to material and information in the possession or control of members of his staff and of any other persons who have participated in the investigation or evaluation of the case.

(5) Upon motion of the defendant showing that he has substantial need in the preparation of his case for additional material or information not otherwise

provided for and that he is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to him. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

(6) The prosecutor shall furnish to the defendant no later than 5 days before trial or at such later time as the court may for good cause permit, together with their relevant written or recorded statements, a list of the names and addresses of all persons whom he intends to call as rebuttal witnesses to the defenses of alibi, compulsion, entrapment, justifiable use of force, mistaken identity, or good character or the defense that the accused did not have a particular state of mind that is an element of the

offense charged.

46-15-323. Disclosure by accused. (1) At any time after the filing in district court of an indictment or information, the accused, in connection with the particular crime with which he is charged, shall upon written request of the prosecutor and for good cause shown:

(a) appear in a line-up;

(b) speak for identification by witnesses;

(c) be fingerprinted, palm printed, footprinted, or voiceprinted;

(d) pose for photographs not involving reenactment of an event;

(e) try on clothing;

(f) permit the taking of samples of his hair, blood, saliva, urine, or other specified materials that involve no unreasonable intrusions of his body;

(g) provide specimens of his handwriting; or

(h) submit to a reasonable physical or medical inspection of his body; however, such inspection does not include psychiatric or psychological examination.

(2) The accused is entitled to the presence of counsel at the taking of any evidence pursuant to subsection (1). Subsection (1) supplements and does not limit any other procedures established by law.

(3) Within 30 days after arraignment in district court or at such later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of his intention to introduce evidence at trial of good character, or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity or the defense that the accused did not have a particular state of mind that is an essential element of the offense charged. The notice must

specify for each defense the names and addresses of the persons that will be called as witnesses at trial in support of the defense. Prior to trial the defendant shall, upon motion and showing of good cause, add to the list of witnesses the names of any additional witnesses. After the trial commences, no witnesses may be called by the defendant in support of these defenses unless the name of the witness is included on the list, except for good cause shown. Any evidence that reasonably becomes available after the initial 30 days shall be admitted if 46-15-327 is complied with.

(4) Simultaneously with the notice of defenses submitted under subsection (3), the defendant shall make available to the prosecutor for testing, examination, or reproduction:

(a) the names and addresses of all persons, other than the accused, whom he

will call as witnesses at trial, together with all statements made by them in connection with the particular case;

(b) the names and addresses of experts whom he will call at trial, together with the results of their physical examinations, scientific tests, experiments, or comparisons, including all written reports and statements made by them in connection with the particular case; and

(c) a list of all papers, documents, photographs, and other tangible objects that he will use at trial.

(5) The defendant's obligation under this section extends to material and information within the possession or control of the defendant or his attorneys and agents.

(6) Upon motion of the prosecutor showing that he has substantial need in the preparation of his case for additional

material or information not otherwise provided for, that he is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the accused's constitutional rights, the court in its discretion may order any person to make such material or information available to him. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

46-15-324. Materials not subject to disclosure. (1) Except as provided in subsection (2), disclosure is not required for the work product of the prosecuting or defense attorney.

(2) If exculpatory information is contained in the work product, that information must be disclosed.

(3) disclosure of the existence of

an informant or of the identity of an informant who will not be called to testify is not required if:

(a) disclosure would result in substantial risk to the informant or to his operational effectiveness; and

(b) the failure to disclose will not infringe the constitutional rights of the accused.

46-15-325. Failure to call a witness or raise a defense. The fact that a witness' name is on a list furnished pursuant to 46-15-321 through 46-15-329 or that a matter contained in a pretrial notice is not raised may not be commented upon at trial unless the court, on motion of a party, allows such comment after finding that the inclusion of the witness' name or the pretrial notice constituted an abuse of the applicable disclosure requirement or that other good cause is shown.

46-15-326. Use of materials. Except as

provided in 46-11-401, any materials, including witness lists, furnished to an attorney pursuant to 46-15-321 through 46-15-329 may not be disclosed to the public but may be disclosed to others only to the extent necessary for the proper conduct of the case.

46-15-327. Continuing duty to disclose. If at any time after a disclosure has been made any party discovers additional information or material that would be subject to disclosure had it been known at the time of disclosure, such party shall promptly notify all other parties of the existence of the additional information or material and make an appropriate disclosure.

46-15-328. Excision and protective orders. (1) Upon a motion of any party showing good cause, the court may at any time order that disclosure of the identity of any witness be deferred for any

reasonable period of time, not to extend beyond 5 days prior to the date set for trial, or that any other disclosures required by 46-15-321 through 46-15-329 be denied, deferred, or regulated when it finds:

(a) that the disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and

(b) that the risk cannot be eliminated by a less substantial restriction of discovery rights.

(2) Whenever the court finds, on motion of any party, that only a portion of a document or other material is discoverable under 46-15-321 through 46-15-329, it may authorize the party disclosing it to excise that portion of the material which is nondiscoverable and disclose the remainder.

(3) On motion of the party seeking a

protective or excision order or in submitting for the court's determination the discoverability of any material or information, the court may permit him to present the material or information for the inspection of the judge alone. Counsel for all other parties are entitled to be present when such presentation is made.

(4) If the court enters an order that any material or any portion thereof is not discoverable under 46-15-321 through 46-15-329, the entire text of the material must be sealed and preserved in the record in the event of an appeal.

46-15-329. Sanctions. If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any of the provisions of 46-15-321 through 46-15-329 or any order issued pursuant to 46-15-321 through 46-15-329, the court may

impose any sanction that it finds just under the circumstances, including but not limited to:

(1) ordering disclosure of the information not previously disclosed;

(2) granting a continuance;

(3) holding a witness, party, or counsel in contempt;

(4) precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; or

(5) declaring a mistrial when necessary to prevent a miscarriage of justice.

(3)

Supreme Court, U.S.
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CLERK

No. 87-1654

In The

Supreme Court of the United States

October Term, 1987

JAMES T. CARKULIS,

Appellant,

v.

STATE OF MONTANA AND DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

MOTION TO DISMISS OR AFFIRM

MICHAEL T. GREELY
Attorney General

*JOHN A. PAULSON
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

Attorneys for Appellees

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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Pursuant to Rule 16.1 of the Rules of this Court, the appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the decision of the Supreme Court of Montana on the grounds that the decision was not a final judgment within the meaning of 28 U.S.C. § 1257 and that the appeal does not present a substantial federal question.

———o———

STATEMENT OF THE CASE

I. STATE STATUTES INVOLVED

This appeal presents the question of the validity of Montana's statutes providing for reciprocal pretrial discovery in criminal cases.

In 1985, the Montana Legislature enacted Mont. Code Ann. §§ 46-15-321 to -329. App. 93a-108a. These statutes set forth the requirements for disclosure by the prosecution (§ 46-15-322) and disclosure by the accused (§ 46-15-323). The statutes also exempt certain materials from the disclosure requirements (§ 46-15-324) and provide for excision and protective orders (§ 46-15-328). The parties have a continuing duty to disclose (§ 46-15-327) and are prohibited from commenting at trial upon any failure to call a witness or raise a defense (§ 46-15-325). The trial court may impose certain sanctions for failure to comply with the discovery provisions (§ 46-15-329).

At issue in this case are the provisions of Mont. Code Ann. § 46-15-323, which require a criminal defendant to make available to the prosecutor the names and addresses of all persons, other than the accused, whom he will call as

witnesses at trial, together with any statements made by them in connection with the case, and a list of all papers, documents, photographs, and other tangible objects that the defendant will use at trial.

II. FACTUAL BACKGROUND

Appellant James T. Carkulis is charged with felony forgery in state district court. Pursuant to Mont. Code Ann. § 46-15-323, the district court has ordered appellant to make available to the State, subject to constitutional or statutory limitations, the names and addresses of all persons, other than appellant, whom he in good faith knows he will call as witnesses at trial and copies of all statements made by them related to the case; the names and addresses of any expert witnesses whom he in good faith knows he will call at trial, together with summaries of their expected testimony; and all papers, documents, photographs, and other tangible objects which appellant in good faith knows will be used as exhibits at trial. App. 58a-60a.

Appellant sought relief from the discovery order by filing a petition for writ of supervisory control or writ of certiorari in the Montana Supreme Court. Mont. Const., Art. 7, § 2(1, 2); Mont. R. App. P., Rule 17(a); Mont. Code Ann. § 27-25-102(2). On December 11, 1986, the Montana Supreme Court denied the petition upon the grounds that the district court had not yet imposed sanctions and that appellant had an adequate remedy by appeal. App. 63a.

Appellant then moved the state district court to reconsider its order. The court denied the motion to reconsider and ordered appellant to disclose the materials set out in

its previous order by May 1, 1987, or be precluded from offering the materials at trial. In its memorandum the district court noted that it is possible that appellant will not know what evidence will be presented very long before trial; as soon as appellant and his counsel do know what witnesses will be called, the court stated, their names, addresses, and statements must be disclosed to the prosecutor. App. 76a-77a.

III. THE DECISION OF THE MONTANA SUPREME COURT

Appellant brought a second petition for writ of supervisory control to the Montana Supreme Court on May 4, 1987. The Montana Supreme Court accepted jurisdiction to determine if supervisory control was proper and denied the petition, holding that the statutory reciprocal pretrial discovery provisions do not violate the state and federal constitutions. *State ex rel. Carkulis v. District Court,* 746 P.2d 605 (Mont. 1987).

In rejecting appellant's argument that the disclosure provisions of Mont. Code Ann. § 45-15-323 violate his state and federal rights against self-incrimination, the Montana Supreme Court relied upon this Court's decision in *Williams v. Florida,* 399 U.S. 78 (1970), as well as upon the reciprocity provided in the state statutes. The state supreme court reasoned that disclosure of prospective witness names and statements was not self-incriminating as to appellant and that the names and statements would be revealed in due course in any event. Applying the "accelerated discovery" rationale of *Williams,* the court held that the State was entitled to the materials in order to avoid surprise, aid the administration of the trial court, and pro-

vide an orderly resolution of the charge. The court also noted the protections for appellant in other provisions of the discovery statutes.

With respect to appellant's claim that disclosure of prospective trial exhibits violated his rights under the Fourth Amendment, the Montana Supreme Court held that the district court's order meets the test of reasonableness under both state and federal constitutions. The court noted that the use of a warrant is not involved in this pretrial discovery procedure and that the discovery order extended only to materials which must eventually come to light at trial.

The Montana Supreme Court also considered and rejected appellant's claim that the imposition of sanctions for failure to abide by the discovery order deprived him of due process. The court relied upon this Court's decisions in *Williams* and *Wardius v. Oregon*, 412 U.S. 470 (1973), in finding that the reciprocal rights of discovery under Montana's statutes provide appellant with due process.

In addition, the Montana Supreme Court found that appellant could obtain a protective order under Mont. Code Ann. § 46-15-328 in the event that observance of the discovery order would result in disclosure of documents which would in themselves incriminate him. The court construed the statute to permit *ex parte* applications for protective orders.

The Montana Supreme Court did not pass upon the appropriateness of the district court's sanctions for the reason that the sanctions have yet to be applied.

Appellant appeals from the decision of the Montana Supreme Court denying his second petition for writ of supervisory control.

ARGUMENT

I. THE DECISION OF THE MONTANA SUPREME COURT IS NOT A FINAL JUDGMENT.

Because the decision of the Montana Supreme Court in this case was not a final judgment within the meaning of 28 U.S.C. § 1257, this Court should dismiss the appeal for want of jurisdiction.

Appellant has not been tried, convicted, or sentenced. The state district court has not applied the preclusion sanction against appellant with respect to any proffered evidence and has left the door open for appellant to make the required pretrial disclosures whenever he determines that evidence subject to the discovery order will be presented at trial. The Montana Supreme Court has reserved the issue of the appropriateness of any sanction actually applied by the district court.

This Court's jurisdiction to review a state court decision is generally limited, under 28 U.S.C. § 1257, to a final judgment rendered by the highest court of the state in which decision may be had. *Flynt v. Ohio,* 451 U.S. 619 (1981); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975). In *Flynt* this Court noted that the final judgment rule precludes reviewability "where anything further remains to be determined by a State court, no matter how

dissociated from the only federal issue that has been finally adjudicated by the highest court of the State." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945).

The final judgment in a criminal proceeding is the sentence. *Berman v. United States,* 302 U.S. 211 (1937); *Parr v. United States,* 351 U.S. 513 (1956). The decision of the Montana Supreme Court denying appellant's pretrial request for supervisory control over the lower court proceedings is therefore not final and should not be reviewed by this Court.

In certain cases the Court has treated state court judgments as final for jurisdictional purposes even though further proceedings were required in the state court. In *Cox Broadcasting Corp. v. Cohn, supra,* the Court described four exceptions to the rule of finality which may apply in criminal cases. None of these exceptions applies to the present case.

Here the federal issues are not conclusive, and the outcome of the further proceedings is not preordained. The federal issue will not necessarily survive and require decision regardless of the outcome of future state court proceedings. Review of the federal issues is not precluded in subsequent proceedings in this case. Finally, refusal to review the state court decision would not seriously erode federal policy.

The decision to grant supervisory control in original proceedings before the Montana Supreme Court has been viewed by this Court as a final judgment where the sole issue concerned the jurisdiction of a lower state court. *Fisher v. District Court,* 424 U.S. 382 (1976). However, the Court's decision in *Fisher,* a state court adoption proceed-

ing which was opposed by an Indian party's claim of exclusive tribal court jurisdiction, does not require review in this case, either by appeal or by certiorari, as an exception to the final judgment rule. As in *Flynt, supra,* it appears in appellant's case that other federal issues will be involved in the trial court, such as whether or not appellant's Sixth Amendment right to compulsory process is violated by imposition of a discovery sanction. *Taylor v. Illinois,* 108 S. Ct. 646 (1988). Since the probability of piecemeal review with respect to federal issues is evident in this case, this Court should permit the state court proceedings to go forward so that a sufficient record on all issues may be developed.

The resolution of appellant's issues can await final judgment without any adverse effect upon important federal interests. *Flynt v. Ohio, supra,* 451 U.S. at 622. This Court should dismiss the appeal for want of jurisdiction.

II. THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant Carkulis contends that his compliance with the state court's discovery order would violate his rights under the Fifth Amendment by requiring him to disclose information which would assist the prosecutor in presenting a *prima facie* case. This contention ignores the procedural safeguards in Montana's discovery statutes and depends upon an exceedingly narrow reading of this Court's previous decisions.

Under Montana's discovery statutes a criminal defendant is *not* required to disclose any information to the prosecutor unless the defendant himself intends to disclose it at trial. If any of the information which the defendant is

obliged to disclose under the law would provide the State with a "link in the chain" of evidence in its case-in-chief, the defendant may move the trial court to deny, defer, excise, or otherwise regulate the disclosure of such information under Mont. Code Ann. § 46-15-328. If good cause is shown, the name of an individual may be added to a defendant's witness list *after* trial has begun, pursuant to Mont. Code Ann. § 46-15-323(3). The discovery statutes also prohibit any additional disclosure requests which would violate the defendant's constitutional rights, which would be unreasonable or oppressive, or which involve the work product of the defendant or his attorney. Mont. Code Ann. §§ 46-15-323(6), 46-15-324.

By including these protections in the discovery statutes the Montana Legislature has recognized and addressed appellant's concern that his disclosure of rebuttal evidence would lead to additional prosecution evidence for the State's *prima facie* case. Appellant has not made use of the protective procedures afforded by the statutes. Viewed in light of all of Montana's discovery provisions this constitutional challenge is without merit.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court concluded that a criminal defendant has no constitutional right to await the end of the state's case before announcing the nature of his defense. The privilege against self-incrimination is not infringed by prosecutorial discovery of the identities of prospective witnesses and trial exhibits where the prosecution is under a reciprical duty to disclose and the disclosures are limited to those witnesses and documents which will actually be used at trial.

Montana's discovery statutes are based upon the accelerated disclosure rationale in *Williams* and upon the

reciprocity required by the Court in *Wardius v. Oregon,* 412 U.S. 470 (1973). In *Taylor v. Illinois,* 108 S. Ct. 646 (1988), this Court noted that there may be cases in which a defendant has legitimate objections to disclosing the identity of a potential witness. Such objections should be raised in advance of trial in response to the discovery request and, if necessary, presented to the court as a request for a protective order. 108 S. Ct. at 656 n.20. Montana's statutes provide for protective orders in such a case, and the Montana Supreme Court has construed the statutes to permit *ex parte* applications for protective orders so that no information not properly discoverable will come to the attention of the prosecutor.

Appellant's Fourth Amendment contention is also without merit. Appellant argues that Montana's discovery statutes concerning pretrial disclosure of prospective trial exhibits violate his right to be free from general warrants. However, the Fourth Amendment has not been viewed by this Court or other courts as limiting the pretrial disclosure of evidence which a defendant intends to use at trial. This case does not involve a warrant or a search and seizure. Compliance with the discovery rule requires only that a defendant accelerate the disclosure of prospective exhibits which will be disclosed at trial and are therefore relevant to the issues in the case. The scope of discovery is defined with particularity in the statutes and is limited to those exhibits which must eventually come to light at trial.

The questions raised in this appeal are so unsubstantial as not to need further argument. The Montana criminal discovery statutes at issue protect the constitutional rights of a defendant while providing both parties the maximum

possible amount of information with which to prepare their cases, reducing the possibility of surprise and disruption at trial. Such discovery procedures are consistent with this Court's previous decisions and enhance the fairness of the adversary system. *Wardius v. Oregon, supra.* No substantial federal question is presented here.

———o———

CONCLUSION

Because the decision of the Montana Supreme Court was not a final judgment and the case does not present a substantial federal question, appellee respectfully moves the Court to dismiss the appeal or, alternatively, to affirm the Montana Supreme Court's decision.

Respectfully submitted,

MICHAEL T. GREELY
Attorney General

*JOHN A. PAULSON
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

Attorneys for Appellees

*Counsel of Record

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